APPENDIX D

Transcript of Proceedings January 2, 1968

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 67-316

ELLINGSON TIMBER COMPANY, *Plaintiff*,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*.

Portland, Oregon

TRANSCRIPT OF PROCEEDING

BEFORE: The Honorable Gus J. Solomon, Chief Judge.

[Tr. 1] The Court: What portions of the proposed pretrial order do you object?

Mr. Cory: Your Honor, we just have a few small changes. Of course, in that pretrial order that Mr. Tilbury sent through inadverteney, did not have all the parts in there.

Mr. Cosgrave: See, this is the pretrial order, your Honor, we have worked out.

The Court: The pretrial order with respect to Court's jurisdiction over the subject matter.

Mr. Cory: Yes. We want to add and the statute of limitation.

The Court: In the title?

Mr. Cory: In the title.

The Court: I will add it. Have you got a contention on the statute of limitation in the pretrial order?

Mr. Cory: Yes, we have a contention on that.

The Court: Which one is that?

Mr. Cory: Just starting from the top over on page three, paragraph four, we would suggest where it says: "Acquired much of their log supply from points in California as well as Oregon. . ." we would like to say, "In California and Oregon."

The Court: Where are you?

Mr. Cory: Well——

Mr. Cosgrave: Mr. Cory, I think it would be easier for [Tr. 2] the Court if we would hand up a copy which has these corrections in it. We have worked on that, your Honor. This is a copy that has the small changes in them.

Mr. Cory: It's on this draft, page three at line 13 and 14 and 27 of that page. They are just some small changes. I don't think Mr. Tilbury objects to them.

Mr. Tilbury: I don't.

The Court: Have you given a copy to Mr. Tilbury?

Mr. Cory: I just gave it to him.

Mr. Tilbury: Just this moment.

The Court: Is there any objection to those small changes that he is suggesting?

Mr. Tilbury: No, sir.

The Court: How about page four?

Mr. Cory: I think page four is all right, your Honor. Page five is okay. Page six of our draft is all right. Page seven is all right down through paragraph 15. Seven through 15 is okay.

Mr. Tilbury proposes additional paragraphs 16, 17 and 18. We don't think we can agree to what he proposes on 16 and 18.

The Court: You want to object to paragraphs 16 and 18?

Mr. Cory: Yes.

The Court: We will delete that and put 17 in the place of 16. Then, you can put 16 and 18 in as your contentions. [Tr. 3] However, that is a fact you can prove at the trial.

Mr. Cory: Then, we did propose a couple of additional short paragraphs on the next page of the draft. I don't think Mr. Tilbury has seen these before. Number 17 on that page would be a duplicate. That would come out.

Mr. Cosgrave: I think I gave you a copy of that before, Roger.

Mr. Cory: It would just be a question of paragraphs 15 and 16 which would be renumbered if they went in.

The Court: Is there any portion of 16 or 18 that you consent to?

Mr. Cosgrave: Well, the first sentence of No. 16, your Honor, is almost the same as our proposed 18. That is one of the reasons we thought that could go in the contentions.

The Court: What do you want to add on your agreed facts?

Mr. Cosgrave: Just those two short ones, your Honor, that are on the half page—short page that follows.

The Court: I have a long distance call from Washington, D.C. We will take a short recess.

(Whereupon a short recess took place, after which the following proceedings occurred:)

The Court: What did you decide in my absence?

Mr. Cory: Well, we have talked about redrafting a [Tr. 4] couple of these later paragraphs. I don't think we will actually reach any agreement.

Mr. Cosgrave: I don't think there will be any problem, Judge. We can redraft those two pages. In other words, the proposed additional agreed facts—the two pages that are entitled Proposed Additional Agreed Facts, I would think we could arrive at something.

The Court: All right. How long will it take you to try this case?

Mr. Tilbury: I don't think it would take very long on the segregated issues.

Mr. Cosgrave: On these issues, it shouldn't take long.

Mr. Tilbury: I am going to reopen an old wound. I have talked to my client and he tells me he thinks there are only five or six interrogatories that would be in this category.

The Court: You can file a supplemental list of interrogatories.

Mr. Tilbury: All right.

The Court: Just ask for what you actually need and give it to counsel and see whether they will be in a position to give you the information. If you don't get the information you need, you can take it up with me.

Mr. Tilbury: The only thing I was concerned about is the fact there may be something I am not aware of. That's [Tr. 5] what I am a little concerned about.

The Court: It is very difficult to file a case and try it on suspicion.

Mr. Tilbury: Yes.

The Court: I think when you file a case, you should have some basis for filing it.

Mr. Tilbury: I certainly agree with that.

The Court: I am going to try to get an outside judge to try the case. But on the question of the statute of limitation and the jurisdiction, when will you be ready to try that?

Mr. Tilbury: I am writing a brief for the United States Supreme Court which I think will be finished in about two weeks, your Honor.

The Court: Do you want to try it in March?

Mr. Tilbury: That will be fine, your Honor.

Mr. Cory: The early part will be fine.

Mr. Cosgrave: That will be fine.

The Court: Are you leaving town?

Mr. Cory: No. Sometimes we have a little vacation about the end of March or early April. The week of March 4th is all right.

Mr. Cosgrave: Your Honor asked about how long it would take. I may have said a half day. If I did, I was referring to the segregated issues.

[Tr. 6] The Court: I know that. There are not very many facts, are there? It is primarily a question of law?

Mr. Tilbury: Yes.

Mr. Cosgrave: Yes.

Mr. Tilbury: The facts could be presented in a few hours probably.

The Court: It will be the week of March 4th.

Mr. Tilbury: I probably should say, your Honor, Judge Belloni is an old acquaintance of Mr. Ellingson. I did not know whether counsel would object.

The Court: Is there very much of a factual problem?

Mr. Tilbury: No.

Mr. Cosgrave: No, I think not. Our position would be that it can be determined as a matter of law. There may be a few minor issues.

The Court: Maybe I can have someone from Seattle come down or maybe I can take this particular part myself.

I am going to set it down for another hearing on the 29th of January. At that time you can submit your pretrial order.

Mr. Cosgrave: At 9:30, your Honor?

The Court: 9:30. If there are other problems, I will hear them at that time. Cut down your requests and give them to counsel and see if they can get together.

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APPENDIX E

Transcript of Proceedings March 4, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. 67-316

ELLINGSON TIMBER COMPANY, *Plaintiff*;

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*.

Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

March 4, 1968

BEFORE: The Honorable Gus J. Solomon, Chief Judge.

[Tr. 1] The Court: Mr. Cosgrave gave me a copy of a brief which I don't have. I know you gave it to me. You didn't take it back, did you?

Mr. Cosgrave: No, sir, I didn't, your Honor.

The Court: All right.

Mr. Cosgrave: I have here a short reply, your Honor, that I hand to counsel.

Mr. Tilbury: I don't want to be left out. I have one too.

The Court: Cleve Cory, you mean you want to be left out?

Mr. Cory: I filed my memorandum Friday, your Honor.

The Court: You don't have any rebuttal or answers?

Mr. Cory: No. I have said my piece.

The Court: I think it is the Defendants who have to go forward, don't you? This is on the issue of the statute of limitation; isn't it?

Mr. Cory: Yes. And, the Court's jurisdiction over the subject matter of the action, your Honor.

The Court: If it is a question of the jurisdiction, I think the Plaintiff goes first. Are you to go first, Mr. Tilbury?

Mr. Tilbury: Whichever way your Honor wishes.

The Court: Go ahead.

[Tr. 2] Mr. Buehner: At this time, your Honor, as we indicated when we were up here Friday, I believe it was, that we would have a few short questions for Mr. Ellingson. We would like to put him on the stand at this time.

The Court: This is the time to put him on. I am not going to decide the case today, because I have not read the briefs. You can just make your record today. Then I am going to take some time to consider the testimony and the exhibits in light of the law.

Before Mr. Ellingson testifies, I think it might be well to make your record on the exhibits. Do you have exhibits?

Mr. Buehner: Yes, your Honor.

The Court: Why don't you offer all your exhibits now.

Mr. Buehner: I think Mrs. Spargo has them all. At this time I think we just might as well—we have no objection to none of their exhibits. And, I assume——

The Court: In the first place, does the Plaintiff offer all its exhibits?

Mr. Buehner: Yes, your Honor.

Mr. Cory: I have no objection, sir.

Mr. Cosgrave: No objection.

The Court: All plaintiff's exhibits are admitted.

Mr. Buehner: Thank you.

The Court: How about the Defendants' exhibits?

[Tr. 3] Mr. Buehner: We have no objection.

The Court: The Plaintiff has no objection to the Defendants' exhibits. All exhibits listed in the pretrial order are admitted.

(Whereupon Plaintiff's Exhibits 1, Photographs of spur track and equipment at Jellico, California; 2, Answer of Great Northwestern Railway Company in

ICC proceeding (No. 32489); 3, Answer of Western Pacific RR Co. in ICC proceeding (No. 32489); 4, Letter from Paul E. Neff to Roger Tilbury dated January 17, 1968; 5, Letter from Cleveland C. Cory to Roger Tilbury dated January 11, 1968; 6, Great Northern Railway Co. Memorandum relating to sale of Klamath Basin Pine Mills dated September, 1961; 7, Letter from Assistant to Comptroller, Glacier Park Co., to Chief Engineer, dated September 28, 1961; 8, Letter from Clark Eckart to J. C. Kenady dated December 6, 1960; 9, Letter from Clark Eckart to J. M. Budd, dated December 23, 1960; 10, Memorandum of Approval from Great Northern Railway Co. entitled "Sale of Klamath Falls Sawmill to the DiGiorgio Fruit Corporation", dated October 20, 1961; 11, Letter from C. E. Finley to J. M. Budd [Tr. 4] dated January 26, 1960; 12, Contract of sale between Great Northern Railway Company, Glacier Park Co. and DiGiorgio Fruit Corporation for sale of Klamath Basin Pine Mills Co. site dated September 14, 1961; 13, Letter from L. L. Shaw to Mr. Eckart dated June 15, 1960; 14, Letter from Mr. Shippey of DiGiorgio Fruit Corporation to Great Northern Railway Co. and Glacier Park Co. dated January 8, 1963; 15, Memorandum prepared for the Board of Directors of Great Northern Railway Co. dated October 20, 1961; 16, Map of Boy Scout Mill site, Klamath Falls; 17, Photo of equipment located on property of Boy Scout site, were received as Plaintiff's exhibits.

Defendants' Exhibits 31, Deposition of Robert P. Ellingson, Jr.; 32, Complaint filed by Plaintiff and its assignor before ICC on June 26, 1958 (Docket No. 32489); 33, Transcript of Proceedings (3 volumes) before Hearing Examiner of the ICC (January 28, 1959-January 30, 1959); 34, Brief of Complainants dated March 25, 1959 and filed with ICC (Docket No. 32489); 35, Report and order of ICC (April 29, 1960) in Docket

No. 32489; 36, Supplemental No. 54 to [Tr. 5] Pacific South Coast Freight Bureau, Tariff 48-U ICC #1553 effective June 6, 1956; 37, Supplemental No. 76 to Pacific South Coast Freight Bureau, Tariff 48-U ICC #1553, effective August 9, 1957; 38, Complaint filed on March 2, 1964, by Plaintiff and its assignor in Circuit Court, Multnomah County, (No. 299-005); 39, Transcript of testimony of Robert P. Ellingson, Jr. in said action (No. 299-005); 40, Letter from R. P. Ellingson, Jr., to John Budd, President of Great Northern Railway Company, dated November 22, 1961; 41, Letter from John Budd to R. P. Ellingson, Jr. dated December 1, 1961; 42, Letter from R. P. Ellingson, Jr., to J. M. Budd, dated December 5, 1961; 43, Letter from R. P. Ellingson, Jr., to Frank Steele, dated July 26, 1961; 44, Letter from F. W. Steele to R. P. Ellingson, Jr., dated August 2, 1961; 45, Letter from R. P. Ellingson, Jr. to Frank W. Steele, dated August 8, 1961 and 46, Letter from F. W. Steele to R. P. Ellingson, Jr., dated August 11, 1961, were received in evidence.)

Mr. Buehner: I think the Court's attention should be called, Mr. Cosgrave, to the fact you have offered three [Tr. 6] or four letters which were not originally in the pre-trial order.

Mr. Cosgrave: Oh, yes, they were listed by the Clerk.

The Court: They were 43, 44, 45 and 46.

Mr. Cosgrave: Yes. Thank you.

Mr. Buehner: Call Mr. Ellingson.

[Tr. 7] R. P. Ellingson, Jr. was thereupon produced as a witness in behalf of the Plaintiff, and having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

The Clerk: Will you state your full name and address, sir.

The Witness: Robert P. Ellingson, Jr.; 1700 Fairmont Street, Klamath Falls, Oregon.

The Clerk: Be seated, please.

Mr. Buehner: If the Court please, in order to shorten this all, all the exhibits including 31, which is the deposition of Mr. Ellingson, which goes into his background, is received in evidence.

The Court: All right. You don't have to go into that. Is Exhibit 31 admitted for all purposes?

Mr. Buehner: That's right.

DIRECT EXAMINATION

By Mr. Buehner:

Q. Mr. Ellingson, you are acquainted generally with the exhibits in this case? A. Yes, generally.

Q. Would you describe what is meant by the Pacific Territory defined in the exhibits in this case? A. The Pacific Territory is divided into the north coast section and the south coast section. Most of this is covered [Tr. 8] by the south coast section. And, it's differentiated between the east of the Rocky Mountains and the west of the Rocky Mountains. The Pacific Coast covers California and Oregon and part of Arizona for my business.

Q. I see. Now, what effect did this hold-back arrangement have with respect to your marketing activities in the lumber business when you were operating?

Mr. Cosgrave: As a matter of record, your Honor, I think I should record an objection at this time to any such testimony unless it relates to matters within the last four-year period prescribed by the Statute of Limitation. I assume the Court will hear it.

The Court: I will note your objection.

Mr. Cory: I would object also.

The Court: I will note your objection and admit it provisionally.

Mr. Cosgrave, tell me what they have sued for and why you have raised the jurisdictional point.

Mr. Cosgrave: Your Honor, this matter began with the filing of this case in a proceeding before the Interstate Commerce Commission which resulted in the decision of the

Interstate Commerce Commission in 1960. That involved a challenge by Ellingson of the rates and what was called a hold back or cut back provision with respect to the tariff. That was decided in 1960, by the Interstate [Tr. 9] Commerce Commission.

Then, later——

The Court: Was that in his favor or against him?

Mr. Cosgrave: It was against him, your Honor.

The Court: All right.

Mr. Cosgrave: With respect to this one point, that cutback method of computing—or assessing rates, which had been in the original tariff, restricted to points other than mountain-pacific territory, which was found unjust and unreasonable. But, that was so found without objection by the Defendants. The Defendants had no objection to that phase of the decision, your Honor.

The Court: All right.

Mr. Cosgrave: It is our position—it is my position, as far as the Defendant Western Pacific is concerned, your Honor, that there is nothing charged against Western Pacific in this case at the present time except the matter of those rates which were established by Pacific South Coast Freight Bureau of which Western Pacific was a member, which was then challenged by Ellingson in the ICC proceeding. And, the rates were found to be not unjust or unreasonable. And, it is our position there is nothing else as far as we are concerned since that time.

The Court: That happened in 1960?

Mr. Cosgrave: Yes, sir.

[Tr. 10] The Court: What about Great Northern, do you join with Western Pacific?

Mr. Cory: We join with them. There are certain other acts alleged against the Great Northern in connection with its sales of Klamath Basin Pine Mill to DiGiorgio Fruit Company, which sale was consummated to the knowledge of Mr. Ellingson in the fall of 1961. And, the claims, besides these freight claims against both defendants, the claim was made that this sale, in some way, monopolized commerce

or prevented Mr. Ellingson, as a competitor from operating his mill; and that it was in violation of the antitrust law.

The Court: Are you through?

Mr. Cory: Yes.

The Court: I am going to overrule the objection and permit the evidence to come in provisionally. Then, I am going to decide at a later time whether I can consider this testimony.

Mr. Tilbury: Your Honor, may I say a word or two about this?

The Court: Yes.

Mr. Tilbury: We accept whatever the Interstate Commerce Commission did in 1960. Whatever their decision was stands, as far as we are concerned. We are not attempting to collaterally attack it. We feel most of this argument is completely irrelevant. What we are charging [Tr. 11] here is a conspiracy to monopolize and drive us out of business. This was consummated in 1963; not in 1960. This issue was not considered by the Interstate Commerce Commission. And, there are many other aspects of this case besides those issues that were considered by the Interstate Commerce Commission. As a matter of fact, there are many facts which have come to our knowledge within very recent times, that, of course, were not available to us in 1960.

I'd like to make it clear; perhaps it already is. But, the thing that we are—one of the aspects of our attack in this case relates to the fact that the Interstate Commerce Commission did find, as Mr. Cosgrave said, that the so-called—he calls it a cut back. A better term is hold back. In other words, they charged us some 40 per cent more than they did any other customer in the United States. This hold-back provision was the only place, according to the Interstate Commerce Commission, where they invoked a similar cause. And, at various times, they held upwards of over $100,000 of our money. It meant that in order to utilize their services, we had to pay the extra 40 per cent. The only possible way we could get it back was to reship our products on the line of either Great Northern or Western

Pacific or both together. And, it also meant, as they provided in their agreement with us, and in their tariff schedule that the only way it could be recaptured is [Tr. 12] if we sold the products some place outside the pacific-mountain area. So, in other words, they prevented us from selling in what would be the market contiguous to our clients. And, it was necessary in all cases to ship our products more than a thousand miles away. This eventually, and we have charged in our complaint, led to the fact, among other activities, that we were forced out of business. And, one of the motivations for this—they have mentioned the other mill in Klamath Falls—Great Northern had another mill in Klamath Falls called the Klamath Basin Pine. And, this mill, as stated, was sold in 1961 to DiGiorgio Fruit Company. We had every reason to believe, and think we will establish that sale was for a grossly inadequate consideration. It was sold on a long-term basis. And, we also think it was also coupled with an agreement that it was necessary to utilize by DiGiorgio the various lines of the Defendants. So, they had a real motivation for this.

The things we are complaining about, as we have stated in our complaint, related to activities which have occurred within a period of four years preceding the filing of our complaint, which was filed in 1967. This essentially is it.

We might add that there are other factors that we think will be developed from time to time. So far, we have had [Tr. 13] only limited discovery methods. And, many of these matters which we have discovered recently have led us certainly to the conclusion that there are certain factors which could be developed as time progresses if your Honor permits.

The Court: Go ahead.

CONTINUED DIRECT EXAMINATION

By Mr. Buehner:

Q. How did this arrangement affect your lumber business in Klamath Falls? A. Actually, we were shut out

of the California market, which we had used for many years. The California market, to us, was a very good mixed car market. In mixed cars, we shipped numbers of species and number of items as against straight car shipment. In straight car shipments, you've got an entirely commodity situation. You have got 100 folds more mills shipping straight car; and very few and limited mills shipping mixed car.

We had a 16-car spot in our plant for making up mixed cars, which is quite an additional expense if you are not physically able to do so.

Now, the California market was a very attractive one to us and had been for many years. We had shipped California since 1933 about. We also shipped into Arizona. With this hold-back penalty arrangement of $30 a car that was harnessed to us by the railroad, we were unable to go into [Tr. 14] that market. We had to ship our lumber east into the transcontinental tariff area, which would be east of Denver; from Denver to Florida, to Portland, Maine, etc. and all through that triangular.

We have been in the lumber business, as I stated, since 1924, in Oregon. And, we are very familiar with this California market. The railroads with this $30 a car hold back, actually forced us out of business in 1963. We would be in business today if we hadn't had that $30 a car hold back. The vast and enormous amount of timber that is located in that Jellico area, there is 75, 85 million feet of that sold annually by the Forest Service every year. It's all contiguous to the railroad and to the spurs we built at Western Pacific in California at great expense. We still own those. We have kept them. We still have a plant site in Klamath Falls. When we liquidated our big plant in 1963, we elected to discontinue business there because the railroad had harnessed us with this $30 car hold back. And, they didn't do that for anybody else. They didn't do it for the mill they leased out with a profit sharing arrangement, which incidentally, if you will excuse me, your Honor, I will have to refer to the railroad——

The Court: Go ahead.

The Witness: — illegal procedure. They moved cars [Tr. 15] for three years or four years out of the California location that the Klamath Basin Pine had in conjunction with their logging operation which was known as Chiloquin Logging Company or Chiloquin Timber Company. They moved, in round figures, I am going to estimate, 10,000 cars out of there or more. It was a very illegal procedure. It was false billing. They set the rates down and up on the basis of gondolas. Gondolas have a limited footage. We didn't discover this until sometime back; a very short time ago, within a year. They moved these 10,000 gondola cars out of there. On a gondola rate, instead of using gondolas, they shipped flat cars. This is another phase that is not most irregular, it's just down right crooked. I have been at a loss to know just what to think of this matter here. You would think that people of the stature that the Great Northern Railroad officials are, would not come under the category of lying to their good customers. We shipped thousands of cars with those people at different times. Even the President of Great Northern lied to me. He wrote me a letter. I got one of the Vice-Presidents, Mr. Finley, who is now retired, he assured me everything was honest, fair and square and there was no gimmicks. Well, I wasn't sold down the river; but I believed him. And, the Executive Vice-President Tom Bowman in Seattle, I met him here in Portland. And, he said, "Well, we value your business. And, you have been very fine [Tr. 16] people with us for years. And, we wouldn't think of anything." We find upon discovery here a short time back that the Great Northern Railroad and the Klamath Basin Pine Mill have got a profit sharing agreement on this plant with the lease. And, it's stated right in there. It's in evidence in one of these exhibits here some place. But, it's in just regular typed out language and quite easy to explain.

Further for discovery, there are some things we are going to have to have. We would like to have the profit sharing arrangement. And, we would like to find out whether

any payment was made for that plant on the lease arrangement, such as canceled checks. In view of the high so-called trusted officials with their falsehoods to me in the past, I could believe anything about them, which is too bad.

Now, the California market was a very attractive and successful market for us for many years. But, when the hold-back penalty arrangement came in, we just—with the harness they put on us with the inbound rates excessively high and the penalty of $30 a car hold back, which we had to bring all the logs in, and warehouse them, more or less, with this $30 a day car, based on the penalty hold back, at one time, we had approximately 199,000 to $214,000 in a kitty account on deposit with the Great Northern Railroad [Tr. 17] in California and drawing no interest. Now, if we were unable to ship any lumber back east, we would be unable to get any of that money back until those cars were shipped out to the east.

Now, we couldn't ship to the south. The California market, again, with mixed cars, developed more dollars. It's a better price. You eliminate, as I stated before, a great deal of your competition. It's a highly selective market. And, it's very attractive. The reason it doesn't work too well in the east is because the mixed car market is serviced and served by a great number of distribution yards that have been installed in the last few years.

We found furthermore—just within the last year or so—we found that the railroad had been paying taxes on this profit that they had this profit sharing agreement with.

Mr. Cosgrave: Your Honor, just to clarify it for the record, I think the witness probably should indicate when he says the railroad, which. I don't think any of this is relevant.

The Court: I think this has been going far beyond any relevant issue.

Mr. Buehner, you should ask the witness specific questions and have the witness answer them.

Mr. Buehner: Very well, your Honor.

[Tr. 18] Mr. Cory: If your Honor, please, for the record, I'd like to make a motion to strike all of Mr. Ellingson's testimony except that which was responsive to Mr. Buehner's question.

The Court: I am going to deny the motion because I am going to consider the relevancy of the testimony anyway.

Q. (By Mr. Buehner) Mr. Ellingson, what was the effect of this $30 hold back on your working capital position? A. As I mentioned before it—well, it was very hampering. It limited our working capital and put us to a great disadvantage, because in the first place, the railroads in their partnership agreement with the Klamath Basin Pine Mill, they never had any hold back for them.

The Court: That was not the question. Did you have unlimited capital or were you borrowing money from the bank in order to continue your business? That is what he wants to know.

The Witness: We weren't broke, no, sir.

The Court: You have already testified that you had about $200,000 in an account for which you were not getting interest on?

The Witness: Yes, sir.

The Court: Did this $200,000 which was dead hamper you in your operation?

The Witness: Yes, sir; of course it did, sir, your [Tr. 19] Honor.

The Court: All right.

Q. (By Mr. Buehner) Mention was made of the sales price of the G.N. mill. You were acquainted with that mill, were you not? A. Yes, sir, quite well.

Q. In your opinion, what would be a fair market value of that mill when it was sold?

The Court: How would that go to prove or disprove any issue in connection with jurisdiction of this Court? I thought there had been testimony that this was done in 1961.

Mr. Buehner: If the Court please, the contract of sale is in evidence. And, that was a ten-year, 20 per cent type of

executory type contract which is in existence today, your Honor. DiGiorgio pays $10,000 a year plus five per cent interest on it.

The Court: What difference would that make?

Mr. Buehner: Well, your Honor, we are prepared to show that the true value of that mill was over a million dollars.

Number two, we are prepared to show by record, that the Great Northern Railway Company at the time, from their own record, did not offer it to anyone else in the area with the exception of Modoc and specifically denied us the [Tr. 20] right to purchase.

The Court: What is it you want him to answer?

Mr. Buehner: Number one, I want him to answer whether the mill was ever offered to him.

The Court: Was the mill ever offered to you?

The Witness: No, your Honor.

The Court: What is the next one?

Mr. Buehner: The value of the mill and what a lumberman would reasonably put the value on that mill.

The Court: In your opinion, what would be the reasonable value of that plant at the time it was sold?

The Witness: I have an answer, your Honor.

The Court: Go ahead.

The Witness: It's not two words.

The Court: Go ahead.

The Witness: Well, I have been in the lumber business a long time, 30 years. That plant—the Klamath Basin Plant was about 25-30 per cent larger in square footage. Naturally, square footage is the basis of any cost. Our plant was insured for over a million dollars. And, that plant over there was worth well over a million dollars plus. In my estimation, that plant has an insurable replaceable value of approximately four million dollars.

The Court: Four million dollars?

The Witness: Yes, sir.

[Tr. 21] The Court: All right.

The Witness: You can check that.

The Court: That's all right. Go ahead.

Q. (By Mr. Buehner) Did that mill compete with your mill in the market place? A. That mill competed with our mill in the market place very much for many years. We lost orders to them back and forth that we are aware of.

Q. Do you know as a fact, whether the Forest Service from, say 1963 to date is selling approximately 80 million feet a year to Jellico Spur Track and Poison Lake Spur Track? A. Yes, sir. In the Poison Lake and Chiloquin area, they are selling 75, 80, 85 million feet every year in that immediate vicinity. That was available to Klamath Falls.

Q. Was that an important source of your timber supply? A. That was a very important source of our timber supply; because we wouldn't have gone down there and spent approximately $50,000 on two railroad spurs just to log 15 million feet—15 million to 20 million feet of logs. The area is still producing in excess of 80 million feet of logs per year. And, in all probability, it's projected by the Forest Service themselves that the cut will be increased. We had the capacity at that time in Klamath Falls, prior to June, July of '63 to handle 65 million to 75 million feet capacity per year with two mills.

[Tr. 22] The Court: Do you have anything further?

Mr. Buehner: No further questions, your Honor.

The Court: Do you have any cross-examination?

Mr. Cosgrave: Yes.

CROSS-EXAMINATION

By Mr. Cosgrave:

Q. Mr. Ellingson, you have previously testified concerning the matter of rates, first before the Interstate Commerce Commission in the hearing on the petition which resulted—first, on July 8, 1958, in a hearing before the Pacific South Coast Freight Bureau with respect to Proposal No. 7363 of these rates. Do you recall that, sir?

The Court: Are they in evidence?

Mr. Cosgrave: There is no record of that that we have, your Honor.

The Court: All right.

A. I don't remember whether I do or don't. The Pacific South Coast Tariff Bureau, whenever that hearing was, if this is what we are talking about, frankly I don't know, they denied me any record of that hearing. So, I don't know.

Q. My only question, Mr. Ellingson, is whether you appeared in 1958 before the Pacific South Coast Freight. I am not saying what the particular testimony was. Did you appear there with respect to rates? A. In generalities, probably, yes.

[Tr. 23] Q. Then, Mr. Ellingson, you appeared and testified in the ICC proceedings in accordance with the documents which are the three volume-record of that proceeding? A. Yes, sir.

Q. Then, sir, you also appeared in the State Court action that you brought here in Multnomah County; is that right, sir? A. No—oh, yes.

Q. Then, your deposition was taken as indicated by the document which is in evidence; is that correct? A. Yes. The deposition was taken last fall.

Mr. Cosgrave: I have no further questions, your Honor.

The Court: Mr. Cory, do you want to ask any questions?

Mr. Cory: Yes. I will ask just a few.

CROSS-EXAMINATION

By Mr. Cory:

Q. Mr. Ellingson, could you tell the Court the extent of the damage to your mill from the fire on July 16, 1961? You did have a fire then, did you? A. Well, Mr. Cory, we frankly had four fires. After the last fire—I'm sorry I can't give you a short answer to—after the last fire, the State Fire Marshal took it under consideration and came down to Klamath Falls on his own with one of the Pacific Coast Inspection Bureau men. And, they decided we had had four set fires by arson. You asked about [Tr. 24] July or what date, I don't know. I will just say we had four set fires in a period of years.

Q. But, getting back to the 1961 fire, according to my notes, it destroyed the power plant, fuel storage and

garage, would that be correct? A. It didn't—at no time, was the power plant ever destroyed. The fuel warehouse, yes, was destroyed one time for a period of time. And, the shop adjacent to it was destroyed.

Q. Well, after that July 19, 1961, fire, was your plant down and out of operation for a while? A. Well, I am sure it had to be. I am sure it had to be for a period of time. But, I can't identify that for you.

Q. Now, in your deposition, you mentioned another fire on Columbus Day, 1962? A. Yes, October, 1962.

Q. Could you tell the Court what damage occurred from that fire? A. Well, the damage at that time burned down the planing mill, which had two machines in it adjacent to a battery of eleven dry kilns. And, in 1957, I believe that plant shipped 59 million feet of lumber.

Q. Was the planing mill ever restored? A. The planing mill was not restored.

Q. So, after that fire, you never did produce any more [Tr. 25] finished lumber, did you, from your plant? A. Just a minute. We shipped our lumber in three masses after that. Some of it went rough dry, as is a procedure —usual procedure for some lumber; some of that lumber was taken to the Thomas Lumber Company in North Klamath Falls and was surfaced by that plant for us for a charge. Some of that lumber was loaded in boxcars and shipped north and east through northeastern Oregon at Baker at our other place and proceeded with milling and transit facilities and shipped to the east.

The Court: What is that issue on, Mr. Cory?

Mr. Cory: Well, it's the date of closure of the plant; and facts surrounding that, your Honor. I have no further questions.

Mr. Buehner: Your Honor, I'd like to say, I think the pretrial order stipulates that the plant was closed, I believe January 3, 1963, the Big Lake Plant—I mean July, 1963.

The Court: All right. Are all the briefs in on this issue now?

Mr. Cory: Yes.

Mr. Tilbury: Your Honor, I had one more my girl is typing up. I will try to have it this afternoon.

The Court: All right. You don't have to rush. I notice there quite a few briefs. They are not short. [Tr. 26] The issue is important. I assume that there are a number of cases cited. Get it in just as soon as you can conveniently do it.

Mr. Tilbury: Yes sir.

The Court: Is there anything else?

Mr. Cosgrave: I was going to say, Judge, you asked if everything was in. This decision—we were given a copy of this decision, Monday. It's attached to the Plaintiff's brief they filed Saturday. That was not answered in any reply. I think we might want to give the Court an explanation with respect to that case. It would be quite brief. It would perhaps be no more extensive than the page and a half I submitted to the Court this morning.

The Court: Is there a State Court action pending now?

Mr. Cosgrave: No, your Honor, a voluntary nonsuit was taken in that action on March 31, 1966, I believe.

Mr. Tilbury: It sounds about right.

Mr. Cosgrave: A copy of that complaint is marked as an exhibit here.

The Court: All right.

Mr. Buehner: Walter, I wanted to ask you, did you ever find the reply you were going to give me?

Mr. Cosgrave: Your Honor, for the record, Mr. Buehner has asked when we marked exhibits—he has listed the answer [Tr. 27] of the Western Pacific in the ICC case. He did not have it. And, I did not have a copy at that time. I will obtain it if he wants to put it in evidence. We will put it in.

The only other thing I would do, for the record, your Honor, I would move to strike all of Mr. Ellingson's testimony on the ground previously stated. And also upon the ground of the various defenses urged in the pretrial order and in our memorandum in this case.

The Court: All right.

Mr. Cory: I will join in the motion.

The Court: I assume that same motion was made by Great Northern.

Mr. Buehner: I would like to ask one other question, your Honor.

The Court: Go ahead.

Mr. Buehner: To your knowledge, has the hold-back provisions in these tariffs, are they in existence today?

Mr. Cosgrave: I will object to that, your Honor, upon the ground and for the reason this is determined in the ICC case, a copy of which opinion is introduced as an exhibit in this case.

Mr. Tilbury: It was determined to be illegal. But, they haven't changed it.

Mr. Buehner: The question is, your Honor: Is the tariff, that is the subject matter, in existence today?

[Tr. 28] The Court: Is that in existence today?

The Witness: Oh, yes. It's still in existence. But, we started shipping logs over the W.P. a long time ago.

The Court: Are you in business now, Mr. Ellingson?

The Witness: Yes, sir, your Honor.

The Court: Are you in the lumber business?

The Witness: Yes, sir.

The Court: In the Klamath Falls area?

The Witness: Well, we still have property down there and some spurs around. And, we are paying taxes. I live there. I actually operate plants in Baker, Oregon, plywood sheeting plant and a couple of sawmills.

The Court: I did not think you were broke, Mr. Ellingson. That was not the reason I asked you that.

The Witness: Yes, your Honor.

The Court: I want to announce that I am glad to hear the lumber business is good around Klamath Falls. My father lost my shirt there more than 60 years ago.

The Witness: We should get together, because I like history.

* * *

APPENDIX F

[The Interrogatories Set Out in Italics were Rejected by the Court]

APPENDIX F

Petitioner's Interrogatories

[The Interrogatories Set Out in Italics Were Rejected by the Court]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 67-316

ELLINGSON TIMBER CO., *Plaintiff*

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation and WESTERN PACIFIC RAILWAY COMPANY, *Defendants*

Plaintiff respectfully addresses the following interrogatories to defendant, Great Northern Railway Company, pursuant to the provisions of Rule 33, Federal Rules of Civil Procedure:

TO: Great Northern Railway Company, and to R. Paul Tjossem, Lawrence D. Silvernale, and Davies, Biggs, Strayer, Stoel & Boley, its counsel:

Preliminaries:

The word "defendant" as used in these interrogatories, shall refer to the defendant, Great Northern Railway Company, unless otherwise specifically stated.

"Defendant", or the word "you", and similar phrases, shall also include all subsidiaries, (including, but not limited to, Glacier Park Company, Inc.) of Great Northern Railway Company, unless otherwise specifically stated, and whether such subsidiaries are still in existence or not, and whether such subsidiaries are wholly are partially owned.

The word "Ellingson", or "plaintiff", or similar phrases, shall include Ellingson Lumber Co., a partnership and Ellingson Lumber Co., a corporation.

The word "log", "logs", or "lumber", encompasses timber, lumber, plywood and all other forest products.

The reference to a "year" is intended to include the entire year of any year mentioned, beginning with January 1st of the year mentioned, to and ending with December 31st. (Thus, for example, a reference to the 1960-7 period, includes the period January 1st, 1960 and ending with the present date.)

The term "Pacific Northwest" is intended to encompass (unless otherwise designated) Northern California, Washington, Idaho, Oregon and Montana.

Where questions are presented relating to rates, such rates are intended to cover joint, as well as separate rates.

The words "tariff", "tariffs", "contract", or "contracts", are intended to encompass all amendments and modifications to such fariffs, tariff, contract or contracts.

The term "Klamath Basin Pine Mills", "Klamath Lumber Company", "Weyerhaeuser Company" and "Di Giorgio Corporation" include their subsidiaries and affiliated companies.

These interrogatories are intended to be continuing in the event any of the answers to these interrogatories should prove to be incorrect, incomplete, outmoded, or superseded at a future date.

If a reference to a previous answer will fully answer the question presented, it is satisfactory with plaintiff if such reference is given.

Interrogatories:

(1) In your Fifth Defense, you refer to an agreement between carriers. With respect to such agreement please state:

(a) The date of such agreement;

(b) The parties to such agreement;

(c) The contents of such agreement (or if you prefer, please attach a copy of such agreement to your answers to these interrogatories;

(d) The date when such agreement was approved by the Interstate Commerce Commission.

(2) In what respect, if any, do you contend that plaintiff's complaint "fails to state an enforceable claim for relief against this defendant" in addition to those defenses specifically set forth in your answer?

(3) (a) Has the defendant been designated by its correct corporate name in this complaint?

(b) If not, what is the correct name?

(4) (a) Who were the principal corporate officers of defendant between the years 1960 and the present date?

(b) What are their present addresses?

(c) What positions did they occupy (for each officer named)?

(d) What position do they occupy at present?

(5) (a) What are the names of all your subsidiary corporations, between 1960-7 (both wholly and partially owned)?

(b) In each instance, please state the percentage of stock ownership in such corporation.

(c) What are the names of all corporations, partnerships, and joint enterprises, besides those mentioned, in which defendant had a proprietary or stock interest of any kind?

(d) In each instance, please state the nature and extent of such proprietary or stock interest.

(6) (a) Did you correspond with, or receive, correspondence from or exchange written memoranda or other written documents with or from Western Pacific Railroad Company relating to Ellingson from 1955-67, (besides work product of your attorneys)?

(b) If so, please list such documents by dates and authors, (or, if you prefer, please attach copies).

(c) What is the general subject matter of each such documents, (or, if you prefer, attach copies of such documents)?

(d) Who is the custodian of such records, and his present position?

(7) (a) Do you concede that the statements contained in paragraph V of Plaintiff's complaint relating to Great Northern are accurate?

(b) If they are not accurate, in what respects do you contend they are inaccurate?

(8) (a) For which lumber or timber companies did you haul products in Northern California or Southern Oregon during 1958-67?

(b) What were the approximate quantities of each product hauled for each of such companies during this period?

(c) Did any officer, director or agent of any company mentioned in your answer to (8) (a) occupy a position of any kind with your company, either as an officer, director or agent?

(d) If the answer to (c) is "yes", please list the names of such individuals, and the position which they occupied in your company and in the other company mentioned in (a).

(9) (a) Did you hold back sums of money for periods of time between 1957 and 1967, which had been paid to you by plaintiff?

(b) If the answer to (a) is "yes":

1) What sums were so held for each year between 1957-67? (Please state separately.)

2) What was the purpose of such holdback?

3) Under what circumstances could such sums be repaid to plaintiff?

4) Were similar holdbacks applied to any other shipper of lumber or timber products in Oregon, California, Washington, Idaho or Montana?

5) If the answer to (9) (b) 4) is "yes", please list such customers, and the amounts withheld for each year between 1957-67.

6) Do you concede that such holdback arrangements impaired plaintiff's ability to market its products to any extent?

(10) (a) Did you extend the same facilities, or make payment for the same facilities, on an equal basis to plaintiff as you extend to other shippers of log and timber products in the Pacific Northwest between 1957 and 1967?

(b) If the answer to (a) is "no",

1) Please list all instances in which facilties were extended to shippers which were not extended to plaintiff?

2) Please state the reason or reasons, in each instance, why the same facilities were not extended to plaintiff.

(11) (a) What log and timber hauling rates were in effect in the Pacific Northwest during the years 1960-7, (or, if you prefer, please attach applicable tariffs and contracts)?

(b) In each instance, please state whether such rates were contained in tariffs or in contracts, and whether such tariffs were published or not.

(c) Under what circumstances were contract rates extended, rather than the utilization of tariff rates?

(d) In the case of the tariffs, were such tariffs published, in each instance?

(e) If the answer to (d) is "no", please list all instances where they were not published.

(12) (a) In what locations in the Pacific Northwest does defendant share trackage with other carriers?

(b) With which other carriers are they shared (in each instance)?

(13) (a) Has defendant paid taxes of any kind for any sawmill, lumber mill or plywood plant in the Pacific Northwest from 1957-67, which mill ships its products to or from its mill utilizing services furnished in whole or in part by defendant?

(b) If the answer to (a) is "yes",

1) Please state the name and location of such mills;

2) Please state the amounts paid for each such mill;

3) Why were such payments made?

4) To whom were such payments made?

(14) (a) What rates were charged to the Klamath Basin Pine Mills and/or Klamath Lumber Company from 1957-1960 from points in Oregon and California for log and timber shipments? (Or, if you prefer, please attach a copy of applicable tariffs.)

(b) What services or facilities were provided by defendant to Klamath Basin Pine Mills and/or Klamath Lumber Company?

(c) What charges, if any, were made by defendant for such services or facilities?

(d) Was any property leased to Klamath Basin Pine Mills and/or Klamath Lumber Company?

(e) If the answer to (d) is "yes",

1) What property was so leased?

2) What rate was charged under such lease?

3) What payments were received?

(f) Was any property sold or being sold under contract, or otherwise, by defendant to Klamath Basin Pine Mills?

(g) If so:

1) What property?

2) What price was charged for each item of property so sold?

(15) (a) What rates were charged to the Klamath Lumber Company and/or Di Giorgio Corporation from 1960-7 from points in Oregon and California for log and timber shipments? (Or, if you prefer, please attach a copy of applicable tariffs.)

(b) What services or facilities were provided by defendant to Klamath Lumber Company and/or Di Giorgio Corporation?

(c) What charges, if any, were made by defendant for such services or facilities?

(d) Was any property or equipment leased to Klamath Lumber Company and/or Di Giorgio Corporation?

(e) If the answer to (d) is "yes",

1) What property was so leased?

2) What rate was charged under such lease?

3) What payments were received?

(f) Was any property or equipment sold or being sold under contract, or otherwise, by defendant to Klamath Lumber Company and/or Di Giorgio Corporation?

(g) If so:

1) What property or equipment?

2) What price was charged for each item of property or equipment so sold?

(16) (a) Did defendant have any proprietary interest of any kind in whole or in part in any lumber or sawmills in Oregon of California during 1955-67?

(b) If (a) is "yes", please state:

1) Name and location of such mills.

2) Nature and extent of ownership therein.

3) Time when such ownership existed.

(17) (a) Was a mill in or near Klamath Falls, which had been owned by Glacier Park Company and/or Klamath Basin Pine Mills sold during the period 1955-67 to Klamath Lumber Company and/or Di Giorgio Corporation or their subsidiaries or affiliates?

(b) If so, what were the terms of sale, including, (but not limited to) its sales price? (Or, attach the contract if you prefer.)

(c) What payments have actually been made?

(d) What items of equipment were included in such sale?

(e) What was the approximate fair market value of such mill on the date of such sale?

(f) What was its approximate rated capacity per 8 hour shift?

(g) What has been the annual production by such mill, since the date of sale?

(h) When did such sale take place?

(i) Which employees or officers of defendant are familiar with the terms of the sale, or with the negotiations which led up to the sale?

(j) What are the present addresses of such employees listed in response to 17 (i), and their present positions?

(k) To what extent did negotiations take place as a preliminary to such sale?

(l) With which other companies were negotiations conducted with the exception of Klamath Lumber Company and/or Di Giorgio?

(m) Was such advertised?

(n) If so, in what manner was it advertised?

(18) What amounts were paid each year by Ellingson to defendant during the years 1955-61 for log and timber movements from Poison Lake and Jellico, California to Klamath Falls, Oregon? (separately stated)

(19) (a) Which of your officers, agents and employees are familiar with the log and timber rates for products moving to and from lumber mills within 50 miles of Klamath Falls, Oregon from 1955-67?

(b) What are their present addresses?

(c) What has been their position with your company since 1955?

(20) (a) Was there a delay of any kind from 1955-67 in quoting log rates to plaintiff?

(b) If the answer to (a) is "yes", please state:

1) The extent of such delay.

2) The reason for such delay.

3) The person or persons who would be familiar with the facts.

(21) With respect to Weyerhaeuser Company and its operations from 1957-67 in Oregan and Northern California, please state:

(a) The general nature of the transportation furnished to them by defendant;

(b) Was such hauling done under the terms of a written contract;

(c) What were the provisions of such contract? (Or, if you prefer, please attach a copy of such contract to your answers.)

(d) What are the names and addresses of your custodians or custodian having charge of records in your control pertaining to log and timber hauls pertaining to Weyerhaeuser?

(e) Which of your officers are familiar with the hauling done by defendant for Weyerhaeuser Company and the rates charged?

(f) What are their offices (past or present) and present addresses?

(g) Did any of your representatives, agents or employees receive any compensation or other items of value from Weyerhaeuser, which sums were retained by such representatives, agents, or employees, and not paid over to Great Northern?

(h) If your answer to (g) is "yes", please state:

1) The names of such agents, representatives or employees.

2) The date of such payment or payments.

3) The amount involved.

4) The reason for such repayment.

(22) (a) What is your understanding of the term "flat rate-cutback"?

(b) Under what circumstances was it utilized between 1955-67 in the Pacific Northwest?

(c) What are the names and addresses of shippers during 1955-67 who were charged on this basis?

(d) What rates were charged to such shippers under this method?

(e) Why was it utilized by defendant?

(23) (a) To your knowledge, to what extent does the Western Pacific Railroad Company engage in business in the State of Oregon?

(b) To what extent do you have business relationships with Western Pacific of any kind which take place or relate to activities in the State of Oregon?

(c) What types of business relationships do you have in Oregon with Western Pacific?

(24) (a) Do you have contracts of any kind with Western Pacific Railroad Company?

(b) If the answer to (a) is "yes", please state:

1) The dates of such contracts.

2) The general nature of such contracts.

3) The effective dates of such contracts.

4) The areas affected by such contracts.

(25) (a) What sums were paid to you between 1955-67 by plaintiff by way of transportation tax?

(b) Were identical charges made to all other shippers of logs and timber products in the Pacific Northwest?

(c) If the answer to (b) is "no", please state:

1) The instances in which different charges were made.

2) The reason for the difference.

(26) (a) From which locations did you transport logs or timber products for Klamath Basin Pine Mills, or its successor in interest, Klamath Lumber Company and/or Di Giorgio Corporation, during 1955-67 in Oregon and California?

(b) What rates were charged in each instance?

(c) Were they permitted to use or to lease any of your facilities or equipment?

(d) If the answer to (c) is "yes", please state:

1) The nature of the equipment or facilities rented?

2) The terms of such lease?

(27) What is the rail mileage from each of the following locations to Klamath Falls, Oregon, when routed in the following manner:

California Location:	*Routing:*
(a) Poison Lake	*Poison Lake-Beiber-Lookout-Klamath Falls.*
(b) Jellico	*Jellico-Beiber-Lookout-Klamath Falls.*
(c) Hambone	*Hambone-Lookout-Klamath Falls.*
(d) Hambone	*Hambone-Mt. Shasta-Klamath Falls*

California Location:	*Routing:*
(e) Ash Creek	*Ash Creek-Lookout-Klamath Falls.*
(f) Ash Creek	*Ash Creek-Mt. Shasta-Klamath Falls*
(g) Esperanza	*Esperanza-Lookout-Klamath Falls.*
(h) Esperanza	*Esperanza-Mt. Shasta-Klamath Falls.*
(i) Bartle	*Bartle-Lookout-Klamath Falls.*
(j) Bartle	*Bartle-Mt. Shasta-Klamath Falls.*
(k) Mt. Shasta	*Mt. Shasta-Lookout-Klamath Falls.*
(l) Mt. Shasta	*Mt. Shasta-Klamath Falls.*
Oregon Location:	
(m) Bly	*Bly-Klamath Falls.*
(n) Yamsey	*Yamsey-Klamath Falls.*
(o) Chemult	*Chemult-Klamath Falls.*
(p) Chemult	*Chemult-Bend.*
(q) Sutherlin	*Sutherlin-Springfield.*
(r) Swisshome	*Swisshome-Coos Bay.*
(s) Molalla	*Molalla-Dallas.*
(t) Seneca	*Seneca-Hines.*
(u) Mazama	*Mazama-Klamath Falls.*

(28) (a) Do you concede that this Court has jurisdiction?

(b) If not, in what respects do you contend this Court does not have jurisdiction?

(29) (a) Do you concede this Court has venue?

(b) If not, in what respects do you contend this Court does not have jurisdiction [*sic*]

(30) (a) Do you have, or have you had, between 1955-67, an interest in the O C & E Railroad?

(b) If so, what is the extent of such interest?

(c) Has this railroad failed to show a profit for many years?

(31) (a) Do you have, or have you had, an interest in Klamath Basin Pine Mills and/or Klamath Lumber Company between 1966-67?

(b) If so, what is the extent of such interest?

(32) (a) Do you have, or had you had, an interest in Chiloquin Timber Company between 1966-67?

(b) If so, what is the extent of such interest?

(33) Have any of the following individuals been employees, agents, officers or stockholders in your company between 1955-67, and, if so, please designate their capacity.

(a) A. N. Beals

(b) King Gray

(c) Wilbur L. Kesterson

(d) M. A. Wyman

(e) M. H. Wyman

(f) D. E. Wyman

(g) W. I. Kesterson

(h) Ed Finley

(34) (a) Has your company had any investment or financial interests in enterprises in which any of the individuals listed in (33) supra, have been owners, or partial owners, between 1955-67?

(b) If the answer to (a) is "yes", please designate the extent of such interest in each instance.

(35) (a) Which of your officers, agents or employees made or participated in the decision which led to the establishment of log rates for plaintiff?

(b) What are their present addresses?

(36) (a) Were the rates for hauling logs or timber products charged to Ellingson increased or decreased at any time between 1955-67?

(b) If the answer to (a) is "yes", please state:

1) The dates when such raises or decreases took place;

2) The extent of such raises or decreases;

3) The reasons for such raises or decreases.

(37) (a) Were the rates for hauling logs or timber products charged shippers for hauling from Ash Creek, California to Klamath Falls, Oregon, increased or decreased at any time between 1955-67?

(b) If the answer to (a) is "yes", please state:

1) The dates when such raises or decreases took place;

2) The extent of such raises or decreases;

3) The reasons for such raises or decreases.

(38) (a) What arrangements did you have with Ellingson for the use of spur tracks owned or leased by defendant during 1955-67?

(b) Was any money or other consideration paid by Ellingson for the use of such facilities?

(c) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(d) Did you pay Ellingson any money or any other thing of value for the use or lease of any spur track owned or leased by Ellingson?

(e) Was any money or other consideration paid by Ellingson for the use of such facilities?

(f) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(39) (a) What arrangements did you have with Klamath Lumber Company and/or Klamath Basin Pine Mills for the use of spur tracks owned or leased by defendant during 1955-67?

(b) Was any money or other consideration paid by Klamath Lumber Company and/or Klamath Basin Pine Mills for the use of such facilities?

(c) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(d) Did you pay Klamath Basin Pine Mills and/or Klamath Lumber Company any money or any other thing of value for the use or lease of any spur track owned or leased by Klamath Basin Pine Mills and/or Klamath Lumber Company?

(e) Was any money or other consideration paid by Klamath Basin Pine Mills and/or Klamath Lumber Company for the use of such facilities?

(f) If so, please specify the extent of such payments, and the facilities for which such payments were paid.

(40) (a) *What arrangements did you have with Weyerhaeuser Corporation for the use of spur tracks owned or leased by defendant during 1955-67?*

(b) *Was any money or other consideration paid by Weyerhaeuser Corporation for the use of such facilities?*

(c) *If so, please specify the extent of such payments, and the facilities for which such payments were paid.*

(d) *Did you pay Weyerhaeuser Corporation any money or any other thing of value for the use or lease of any spur track owned or leased by Weyerhaeuser Corporation?*

(e) *Was any money or other consideration paid by Weyerhaeuser Corporation for the use of such facilities?*

(f) *If so, please specify the extent of such payments, and the facilities for which such payments were paid.*

(41) (a) *Were there any occasions between 1955-67, when your company did not make log cars available within 48 hours for shipments by Ellingson when you were requested to do so by Ellingson?*

(b) *If the answer to (a) is "yes", please specify:*

1) *The time when such delays occurred.*

2) *The reason for such delay.*

(c) *Did your company at any time, indicate to Ellingson that log cars would not be made available unless Ellingson agreed to ship all products, after they had been manufactured by Ellingson, over facilities of defendant?*

(d) If the answer to (c) is "yes", please state:

1) The occasion, or occasions, when such statements were made.

2) The individual who made such statements.

3) Whether such individual was authorized to make such statements or statement.

(42) (a) Were switching charges imposed by defendant in Klamath Falls, or within 2 miles of Klamath Falls, at any time between 1955-67?

(b) To which places were they applied?

(c) What was the extent of such charges?

(d) When were such charges applied?

(e) From which mills were such charges collected?

(f) Were the charges precisely identical for all mills?

(g) If they were not identical, please specify:

1) The instances when they were not identical.

2) The reason or reasons why they were not identical.

(43) (a) What was the purpose for utilizing the "flat rate-cutback" plans by defendant?

(b) Were they utilized for any other shippers with the exception of Ellingson at any time between 1955-67 in the Pacific Northwest?

(c) If the answer to (b) is "yes", please specify:

1) The names of such shippers.

2) The places where such rates were applicable.

3) The reason or reasons for such plans.

4) The time when they were in effect.

(44) (a) Did your company extend a millage in transit rate to any lumber or timber company in the Pacific Northwest during the period 1955-67?

(b) If so, please describe:

1) The instances in which it was utilized.

2) The times when it was employed.

3) How were the charges calculated in each instance?

(45) (a) Were log shipments made by gondola type equipment between 1955-67 over your facilities originating from Ash Creek, Esperanza or Bartle, California, from 1955-67 and destined for the Klamath Falls area?

(b) If so, which shippers utilized such equipment?

(c) In general terms, were such shipments rare, frequent or only sporadic?

(d) Was a specific rate charged which was applicable to gondola car movements?

(e) Did Ellingson make shipments utilizing such equipment?

(f) Was such equipment made available to Ellingson?

(46) (a) In addition to the contract rates for shipments between 1955-67, were any additional allowances, concessions, credits, or things of value paid to Weyerhaeuser Corporation for shipments made by such company over your trackage, (either owned or leased jointly or individually)?

(b) If the answer to (a) is "yes", please state:

1) The nature of such payments, concessions, things of value, allowances, or credits.

2) The extent of such payments, concessions, things of value, allowances or credits.

3) The time or times they were given or allowed.

(47) (a) *Do you concede that the rate charged per mile for shipping lumber products into Klamath Falls from Poison Lake and Jellico, California was among the highest rates in the Pacific Northwest?*

(b) *If the answer to (a) is "no", please state, in percentage terms, how plaintiff's rates compared with those charged other shippers for hauling similar type products.*

(c) *If the answer to (a) is "yes", please state the reason it was among the highest rates.*

(48) (a) *Did any of your officers or employees hold meetings with representatives of Western Pacific Railroad Company between 1955-67, during which the subject of log rates in the Pacific Northwest was discussed?*

(b) *If "yes", please state:*

1) *The names of those who attended who represented Great Northern.*

2) *The names of those who attended who represented Western Pacific.*

3) *The date or dates of such meeting.*

4) *The nature of any agreements, whether oral or written which were discussed.*

5) *The nature of any agreements, whether oral or written, which were reached.*

6) *The place of such meetings.*

7) *Were written notes or minutes of such meeting maintained?*

8) *Who is the custodian, and what is his present address, of any such notes or minutes?*

(49) (a) *Were any switching charges levied by defendant to any mill either in, or within five miles, of Klamath Falls, Oregon at any time from 1957-67?*

(b) If the answer to (a) is "yes", please state:

1) The circumstances under which such charges were made.

2) The companies who made such payments.

3) The amounts paid to defendant by such companies.

(50) (a) *What is meant by the term "mixed cars"?*

(b) Was plaintiff permitted to make mixed car shipments between 1957-67?

(c) Were other lumber or timber compgnies permitted to make mixed car shipments in the Pacific Northwest between 1957-67?

(d) If the answer to (c) is "yes", please state:

1) The names of the companies who made such shipments.

2) The period of such shipments.

3) The extent to which it was done.

(e) Did plaintiff receive precisely the same type of treatment with respect to mixed car shipments as other mills in the Pacific Northwest?

(f) If there was a difference, please state the reason for such difference.

(51) (a) *Were the rates charged to plaintiff from 1957-67 affected by the number of log cars which comprised a single shipment?*

(b) To what extent did it vary?

(c) Were precisely the same variations made to other shippers of lumber or timber products from 1957-67?

(d) If there was a difference, please explain:

1) The instances in which there was a variation.

2) The reason for such variance, if any.

(52) (a) Was Ellingson precluded from using any log dumps by your company during 1957-67?

(b) If so, please state:

1) When this occurred.

2) Why this occurred.

3) Where this occurred.

(53) (a) Did your company or Glacier Park Company, Inc., buy or lease any equipment for Klamath Basin Pine Mills or Klamath Lumber Company or Weyerhaeuser Company during 1957-67 in the Pacific Northwest?

(b) If so, please state:

1) The times of such purchases.

2) The reason for such purchases.

3) Was any similar equipment purchased for plaintiff:

4) If the answer to (3) is "no", why not?

(54) (a) Did your company pay or credit Klamath Basin Pine Mills, Klamath Lumber Company, or Weyerhaeuser Company for log dump work during 1957-67?

(b) If so, please state:

1) The times of such payments or credits.

2) The reason for such payments or credits.

(55) (a) *Did you furnish stakes for log cars for any lumber or timber company in the Pacific Northwest between 1957-67?*

(b) *If the answer to (a) is "yes", please state the dates, places, and companies for whom they were purchased.*

(c) *Were similar stakes made available to plaintiff?*

(d) *If the answer to (c) is "no", why not?*

(56) (a) *Did you make any rebates or issue any credits of any kind to any lumber or timber company in Oregon or Northern California between 1957-67, not otherwise mentioned in your prior answers to the preceding interrogatories?*

(b) *If so, please state the:*

1) *Date;*

2) *Place;*

3) *Amount;*

4) *Reason for such rebates.*

(57) (a) *Do you have in your possession or subject to your control the equipment register which pertains to the mill in or near Klamath Falls, Oregon, operated by Klamath Basin Pine Mills and/or Klamath Lumber Company?*

(b) *If so, please state the name and address of the custodian of such register.*

(58) (a) *What are the names of all your employees or former employees who dealt with plaintiff during the period of your business relationship with him.*

(b) *What were their positions with you during the period?*

(c) *What are their present positions?*

(d) *What are their present addresses?*

(59) (a) What were the names of your branches and departments from 1957-67?

(b) What were the names of the individuals having charge of such branches or departments? (Or, if you prefer, please attach a copy of your reports to stockholders or similar report, if it contains this information.)

(c) What are the present addresses of such individuals?

(60) Please identify all documents or other papers or letter upon which you rely as constituting proof or as containing or being evidence of any of the allegations contained in your answer in this case?
With respect to each such document, letter or paper, please state:

(a) The date thereof;

(b) The nature and general description thereof;

(c) The name of the writer;

(d) The name of the addressee (if any); and

(e) The name and address of the person who presently has custody of the original.

(61) (a) Which of your officers, employees, agents, or representatives or former employees, officers, agents or representatives do you feel can establish the statements contained in your answer?

(b) What are their present addresses and positions?

(62) (a) Do you concede you violated the antitrust acts in any respect with respect to your dealings with Ellingson?

(b) If so, in what respect or respects?

(c) Are you willing to permit this case to proceed to trial with the issues solely limited to the question of damages?

(63) (a) Do you concede defendant is engaged in interstate commerce?

(b) Do you concede plaintiff is engaged in interstate commerce?

(c) Do you concede that your business relationship with plaintiff affected interstate commerce?

ROGER TILBURY
HENRY A. BUEHNER
Attorneys for Plaintiff

APPENDIX G

District Court Opinion and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 67-316

ELLINGSON TIMBER CO., *Plaintiff*

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation; and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*

Opinion and Order

June 20, 1968

SOLOMON, Judge:

OPINION AND ORDER

Ellingson Timber Co. (plaintiff) filed an action for damages from the Great Northern Railway Company and the Western Pacific Railroad Company (defendants) for violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Plaintiff's complaint, filed June 8, 1967, alleges that the defendants conspired to restrain and monopolize the lumber trade in the Klamath Falls, Oregon, area by charging plaintiff unfair and excessive rates and by discriminating in favor of plaintiff's competitors.

Defendants contend (1) that this action is barred by the four-year statute of limitations, 15 U.S.C. § 15(b); and (2) that this Court has no jurisdiction because all of the defendants' alleged illegal activities concern rates which the Interstate Commerce Commission approved. The issues raised by the defendants' contentions were segregated for trial.

The statute of limitations in a civil antitrust action runs from the commission of the last overt act which causes damage. *Steiner* v. *20th Century-Fox Film Corporation*, 232 F.2d 190 (9th Cir. 1956); *Garlick* v. *Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963). Where there is a continuing conspiracy, the statute runs from the time the defendants last invaded the plaintiff's rights. *Highland Supply Corporation* v. *Reynolds Metals Company*, 327 F.2d 725 (8th Cir. 1964); *Steiner* v. *20th Century-Fox Film Corporation*, supra.

Plaintiff made no shipments over the defendants' lines after June 17, 1958. Its operations were sharply curtailed when portions of its mill were destroyed by fire in June, 1961, and October, 1962. Plaintiff ceased all operations in the Klamath Falls area on July 3, 1963.

Plaintiff's allegation that it has been damaged by acts of the defendants which occurred "within a period less than four years prior to the filing of this complaint" is not supported by any evidence. I find that any act of either defendant which may have damaged the plaintiff occurred prior to June 8, 1963.

There is no merit in plaintiff's contention that defendants fraudulently concealed their activities. Plaintiff knew of all of the defendant's alleged illegal activities prior to June 8, 1963.

On the issue of jurisdiction, the evidence, particularly the testimony of Mr. Ellingson, shows that the plaintiff's claim is no more than an attack on rates which plaintiff unsuccessfully challenged before the Interstate Commerce Commission. *Ellingson Lumber Company*, 310 I.C.C. 249 (1960). Under these circumstances, this Court is without jurisdiction to consider plaintiff's claim. See *Standard Oil Company (Indiana)* v. *United States*, 283 U.S. 235 (1931); *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156 (1922). Although plaintiff asserts that defendants have continued to discriminate in favor of plaintiff's competitors and that the Commission's decision is not involved

in this action, plaintiff failed to produce any evidence to support these vague allegations.

The action is dismissed.

This opinion shall constitute findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure.

Dated this 20th day of June, 1968.

GUS J. SOLOMON
United States District Judge

APPENDIX H

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,362

ELLINGSON TIMBER COMPANY, *Plaintiff-Appellant*

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, a corporation, *Defendants-Appellees.*

Appeal from the United States District Court for the District of Oregon

[Decided: April 21, 1970]

Before: HAMLEY and BROWNING, Circuit Judges, and *BYRNE, District Judge

PER CURIAM:

Plaintiff-appellant operated a lumber mill at Klamath Falls, Oregon. Defendants-appellees transported logs to plaintiff's mill and reshipped the finished lumber to various markets.

Plaintiff filed this suit to recover treble damages for alleged violations of the Sherman Act, 15 U.S.C. § § 1, 2, 15. Defendants pleaded two affirmative defenses: first, that the action was barred by the four-year statute of limitations (15 U.S.C.A. § 15(b)); and, second, that the district court lacked subject matter jurisdiction because the matter

*Honorable William M. Byrne, Senior Judge of the United States District Court for the Central District of California, sitting by designation.

complained of had been litigated before the Interstate Commerce Commission in a prior proceeding initiated by plaintiff and had been decided against plaintiff.

These defenses were segregated for separate trial to the court. After trial the court dismissed the action on both grounds. In sustaining the second ground the district court said:

> "On the issue of jurisdiction, the evidence, particularly the testimony of Mr. Ellingson, shows that the plaintiff's claim is no more than an attack on rates which plaintiff unsuccessfully challenged before the Interstate Commerce Commission. *Ellingson Lumber Company*, 310 I.C.C. 249 (1960). Under these circumstances, this Court is without jurisdiction to consider plaintiff's claim. See *Standard Oil Company (Indiana)* v. *United States*, 283 U.S. 235 (1931); *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156 (1922). Although plaintiff asserts that defendants have continued to discriminate in favor of plaintiff's competitors and that the Commission's decision is not involved in this action, plaintiff failed to produce any evidence to support these vague allegations."

We agree with the trial court.

Plaintiff's principal contentions before both the Commission and the trial court were that certain of defendants' rates were unreasonable and discriminatory and that defendants gave preferences to a competitive mill owned by defendant Great Northern. The Commission decided these issues against plaintiff. *Ellingson Lumber Co.* v. *Great Northern Ry.*, 310 I.C.C. 249, 256 (1960). The cases cited by the trial court preclude relitigation of the issues in a private antitrust treble damage action in a district court. *See also Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453, 457-58 (1945); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968); *cf. Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 224 (1966).

It is true that the Commission found one aspect of defendants' so-called "cutback" rate unlawful. But under the

authorities cited (*see, e.g., Standard Oil Co. v. United States*, 283 U.S. 235, at 240-41 (1931)), submission of this issue to the Commission in support of a claim for reparations constituted an election of remedies; and plaintiff is bound by the election even though it is now dissatisfied with the remedy. Moreover, contrary to plaintiff's contention, the Commission held the "cutback" rate lawful in all respects but one, and plaintiff's own evidence established that the consequences of which plaintiff complains flowed from the rate in the form approved by the Commission.

The record also supports the trial court's conclusion that the miscellany of charges which plaintiff argues were not before the Commission (alleged preferences to defendant Great Northern's Klamath Falls mill, circumstances surrounding the sale of that mill, and alleged preferences to another mill competing with plaintiff) were merely vague allegations, insufficient to impair the overwhelming showing that the real substance of plaintiff's complaint had been submitted to the Commission and resolved in defendants' favor.

Plaintiff contends that the court improperly limited discovery.

Under Federal Rule of Civil Procedure 42(b) the court had power "in furtherance of convenience or . . . when separate trials will be conducive to expedition and economy . . . [to] order a separate trial . . . of any separate issue or issues." It is implicit that the court also had power to limit discovery to the segregated issues. *See Hayden v. Chalfant Press, Inc.*, 281 F.2d 543, 544 (9th Cir. 1960); Decker & Allard, Separation and Separate Presentation of Issues in Antitrust Cases, 4 Corp. Prac. Comm. 40, 61 (1962). One of the purposes of Rule 42(b) is to permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive preliminary issues. *See* Schwartz, Severance—A Means of Minimizing the Role of Burden and Expense in Determining

the Outcome of Litigation, 20 Vand. L. Rev. 1197, 1204-05 (1967); Note, Separate Trial of a Claim or Issue in Modern Pleading, 39 Minn. L. Rev. 743, 758 (1955).

As we read the record, the only limitation which the trial court imposed upon discovery was to restrict it to the segregated issues. The court's disallowance of certain of plaintiff's interrogatories was expressly subject to the right to file supplemental interrogatories relevant to the segregated issues, if plaintiff wished to do so, and plaintiff apparently did not. So far as the record shows, plaintiff did not seek to take depositions, secure the production of documents, or request admissions.

After completion of briefing we raised the question whether there had been a waiver of a right to jury trial on the segregated issues. The parties submitted supplemental memoranda addressed to that issue. Assuming the point may be considered though not raised below, the record establishes a waiver.

Affirmed.

No. 716

OCT 19 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1970

ELLINGSON TIMBER COMPANY,

Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation; and WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GREAT NORTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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